

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
Applications for Consent)
to the Transfer of Control of Licenses)
Section 214 Authorizations from)

CC Docket 98-141

AMERITECH CORPORATION,)
Transferor)

to)
SBC COMMUNICATIONS INC.,)
Transferee)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF
FOCAL COMMUNICATIONS CORPORATION,
ADELPHIA BUSINESS SOLUTIONS, AND
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.
RE: PROPOSED CONDITIONS

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SUMMARY

The proposed conditions upon the merger of SBC Communications Inc. ("SBC") and Ameritech Corporation ("Ameritech") are a welcome first step, but they do not go far enough in ensuring that the proposed merger would be in the public interest. The proposed merger should therefore be rejected unless stronger conditions and improved performance enforcement mechanisms are put in place to mitigate the anti-competitive consequences of this merger proposal.

There are at least seven general respects in which the proposed Merger Conditions would not serve the desired purpose of promoting competition and protecting the public interest:

1. Promotional Discounts: There is no basis for limiting the resale and unbundled loop pricing "promotions" to residential services, nor is there any reason to cap the number of loops to which the promotion would apply. In fact, the way in which the promotions are designed would give SBC/Ameritech a great deal of flexibility in ensuring that the promotions have as little competitive impact as possible.
2. Advanced Services: General principles regarding the availability of loop pre-qualification and qualification information should not substitute for an absolute standard. The desire to promote the deployment of advanced services provides no reason to allow SBC/Ameritech to create an advanced services affiliate in the context of this proceeding.
3. Operations Support Systems ("OSS"): SBC/Ameritech's schedule for the deployment of OSS is entirely unrealistic and would result only in disputes and delay. OSS deployment should be made a *pre-condition* of merger approval.
4. Collocation: The collocation "conditions" represent no more than a restatement of existing Commission rules. Tariffs governing collocation should be filed, reviewed, and approved *prior* to merger approval.
5. Directory Listings: SBC/Ameritech should be required to provide directory listings to competitors at cost-based prices.
6. "Most Favored Nations": The proposed "Most Favored Nations" provisions must be changed to eliminate internal inconsistencies and to minimize SBC/Ameritech's ability to dodge making favorable terms available to competitors.

7. Performance Incentives: SBC/Ameritech should commit to complying with more than a mere fraction of the measures to which SBC has already agreed in Texas. These measures – and the payments for violations of them – should then take effect much more quickly than proposed by the merger applicants.

Finally, there are two additional respects in which the Merger Conditions should be changed to enhance their effectiveness. First, the Commission should eliminate the arbitrary sunset provisions of the conditions, and use in their stead a biennial review process starting 5 years out to consider the continuing need for specific conditions. Second, SBC/Ameritech's compliance with the Merger Conditions – which are being proposed so that this merger might serve the public interest – should be a part of the public interest analysis in any subsequent section 271 proceeding involving one of the SBC/Ameritech operating companies.

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FOCAL COMMUNICATIONS CORPORATION,
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MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.
RE: PROPOSED CONDITIONS**

Focal Communications Corporation ("Focal"), Hyperion Telecommunications, Inc., d/b/a Adelphia Business Solutions ("Adelphia"), and McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") (collectively, "Joint Commenters"), by undersigned counsel, hereby submit their Comments regarding the conditions proposed to the Commission (the "Merger Conditions") in connection with the merger application of SBC Communications Inc. ("SBC") and Ameritech Corporation ("Ameritech"). All three of the Joint Commenters have previously submitted Comments in this proceeding explaining why this proposed merger would not be in the public interest.¹ The Joint Commenters commend the Commission for its initiative in working with

¹ See *Comments of Focal Communications Corporation in Opposition to Application for Transfer of Control*, CC Docket No. 98-141 (filed Oct. 15, 1998); *Comments of Hyperion Telecommunications, Inc. in Opposition to the Transfer of Control*, CC Docket No. 98-141 (filed Oct. 15, 1998); *Comments of McLeodUSA Telecommunications Services, Inc. in Opposition to the Transfer of Control*, CC Docket No. 98-141 (filed Oct. 15, 1998). In lieu of spelling out here again their arguments as to why this proposed merger would not be in the public interest, the Joint

interested parties to develop conditions to protect and promote competition in the potentially combined SBC/Ameritech region. However, while the proposed Merger Conditions represent a first step toward ensuring that this merger might ultimately serve the public interest, they are a minimal step at best and would not effectively serve this purpose. The Commission should therefore reject the proposed merger unless these conditions are strengthened and enhanced as recommended herein, and only if appropriate enforcement mechanisms are put in place to ensure that these conditions serve the pro-competitive purposes for which they are adopted.

I. IMPROVED COMMITMENTS ARE NECESSARY TO ENSURE THAT THE PUBLIC INTEREST IS SERVED BY THE PROPOSED MERGER.

A. The Proposed "Promotional" Discounts are Subject to Baseless and Potentially Discriminatory Limitations.

The Merger Conditions propose to establish "promotions" under which unbundled local loops would be available at a discount of 25 percent and resold lines would be available at a 32 percent discount off of the retail rate.² These pricing promotions, however, are so riddled with restrictions and caveats that they will likely be of little help in prompting long-term competitive growth in the combined SBC/Ameritech region.

Commenters refer the Commission to these previously filed Comments for such analysis.

² *Proposed Conditions for FCC Order Approving SBC/Ameritech Merger* ("Merger Conditions"), App. A at 2.

1. Limiting the Resale and Unbundled Loop "Promotions" to Residential Services Would Arbitrarily Narrow the Customer Base to Which CLECs Can Offer Lower Prices.

The first concern is that SBC/Ameritech's promotions are limited to loops and resold lines used to provide service to residential consumers. While the Joint Commenters certainly support the notion of making it more economical for competitors to enter the residential local exchange market – in fact, McLeodUSA has already developed and continues to cultivate a sizeable presence in the residential market throughout its service region – there is no principled basis for limiting the application of the discount to residential lines. Instead, this limitation serves to arbitrarily, unnecessarily, and artificially narrow the customer base to which competitive local exchange carriers ("CLECs") can offer lower prices. Absent any explanation why business customers should be excluded from the benefits of lower pricing associated with a more competitive market, there is no basis for limiting the application of these "promotional" rates to residential customers.³

Even if the discounted rates ultimately are limited to residential services for some principled and well explained reason, the Commission needs to make clear that the focus in applying the discount is upon the end user recipient of service, rather than the vehicle used to deliver the service.

³ The discounts should not only be extended to business services, but also apply to the resale of xDSL services as well. The Commission has previously found that xDSL services are "telecommunications services" that are subject to the resale obligations of incumbents. *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24012 (1998) ("*Advanced Services NPRM*"), at ¶ 60. SBC/Ameritech should be committed to providing xDSL services for resale, and compelled to apply the "promotional" discounts to these services just as in the case of any other telecommunications service.

This is particularly important for carriers such as McLeodUSA, who utilize a Centrex platform to resell local exchange services to both residential and business customers. The mere fact that SBC/Ameritech may consider Centrex-type services to constitute business products does not mean that CLECs should be denied a discount in using the Centrex platform to resell services to residential customers. Thus, while limiting the application of the "promotional" discounts to residential services would be arbitrary and even discriminatory, if the Commission still adopts such a limitation, it should clarify that qualification for the discounts will depend upon the status of the end user rather than the vehicle by which service is delivered.

2. There is No Reason to Cap the Number of Unbundled Loops that Would be Subject to the "Promotional" Discount.

A second problem with the manner in which the unbundled loop "promotion" is structured comes in the absolute numerical limitation imposed on the number of loops available. Under the proposed Merger Conditions, SBC/Ameritech would only allow the 25 percent discount to apply to a threshold number of loops in each jurisdiction. Yet no explanation is provided of how these limitations were derived, or why any limitations at all are needed or warranted. The creation of a cap on unbundled loops could in fact harm facilities-based competition and lead to discrimination between CLECs, by punishing those carriers who build out in a market (or wish to convert from resold services within a market) after other CLECs have already driven the cap to its ceiling. Such a result is clearly contrary to the purposes of the Communications Act of 1934, as amended by the

Telecommunications Act of 1996 ("Act"). The Commission should therefore strike any provision that would limit the amount of loops to which the "promotional" rate would apply.

3. The Merger Conditions Would Provide SBC/Ameritech With an Ability to Suppress Competition in a Selective and Self-Serving Manner by Manipulating Unbundled Loop Prices.

Another problem with the proposed "promotional" loop rates comes in how the discount is to be applied. Rather than simply applying a 25 percent discount to the existing unbundled loop rates in each jurisdiction, the vague Merger Conditions seem to allow SBC/Ameritech to manipulate the application of the discount to funnel competition into certain areas it chooses. Specifically, while SBC/Ameritech will determine the application of the discount "across all geographic areas," the Merger Conditions afford SBC/Ameritech "sole discretion" to determine how and where the discount will apply within a particular geographic area of a state. As a result, it would seem that SBC/Ameritech could decide that the discount will apply to a very limited degree in certain areas where it wishes to stem the tide of competitive entry, while discounting loops in other areas by more than 25 percent, as long as the statewide discount is "on average" 25 percent.⁴ This pricing flexibility would allow SBC/Ameritech to game the system impermissibly to the detriment of its competitors, and undermine the purpose of ensuring that *all* customers enjoy the benefits of

⁴ *Merger Conditions*, App. A at 24. Moreover, nothing seems to prevent SBC/Ameritech from changing its mind and, at its "sole discretion," deciding to shift the application of the discount within the state again at a later date. Allowing SBC/Ameritech to change unbundled loop rates within a state at its whim would give the company the ability to respond to waves of competitive entry by restructuring its rates, and would wreak havoc upon CLEC business plans that depend upon some certainty in loop prices (since they are critical cost inputs to CLEC operations).

competitive entry. A sounder, clearer, and more pro-competitive course of action would be to require that the 25 percent discount apply "across the board" to all unbundled loops.

4. The "Promotional" Discounts Should Last at Least as Long as the Other Merger Conditions are Effective.

Finally, the Merger Conditions inappropriately limit the effectiveness of the discounts. SBC/Ameritech would be allowed to terminate the unbundled loop "promotions" in a given state upon the latest of the following dates: (i) 2 years from the date the promotion becomes effective; (ii) the date upon which SBC/Ameritech is authorized to provide interLATA service in that state; or (iii) the date upon which SBC/Ameritech provides competitive facilities-based local exchange service to at least one customer in each of 15 out-of-region markets.⁵ There is no rational basis for limiting the discounts to perhaps only two years, given the time-consuming nature of entering a market on a facilities basis and the need to ensure competitive development over a longer term. Indeed, it could be very difficult for carriers that are "on the fence" to justify facilities-based investment in a jurisdiction on the basis of unbundled loop rates that could be effective for only 24 months, particularly in the face of a dominant ILEC with the size and resources of SBC/Ameritech. The "promotional" discounts should therefore be made available for at least as long as the other Merger Conditions will remain effective.⁶

⁵ *Id.*

⁶ *See* Section II, *infra* (recommending at least a 5-year duration for the Merger Conditions).

Moreover, there is no reason to tie the effectiveness of the in-region discounted unbundled loop rates to activities by SBC/Ameritech out-of-region. If the purpose of providing discounted rates is to promote and protect the development of a competitive local exchange market within the SBC/Ameritech combined region, SBC/Ameritech's activities in other incumbent regions will have little relationship to this goal.⁷

The Commission should therefore modify the provision governing the expiration of the discounted unbundled loop rates. In lieu of the present expiration provision in the Merger Conditions, the discount applicable to SBC/Ameritech's unbundled loops would expire on a state-by-state basis upon the later of the following: (i) 5 years from the date the promotion becomes effective (provided that there is any sunset upon the Merger Conditions); or (ii) the date upon which SBC/Ameritech is authorized to provide interLATA service in that state.

⁷ SBC/Ameritech will likely argue in response that their activities out-of-region will cause other incumbents to retaliate, so that there would be no need for discounted loop rates to promote in-region competition. Even if this were true, the lengthy nature of the planning process involved in SBC/Ameritech's National Local Strategy itself indicates that it is not so easy to simply decide to enter and effectively compete in specific markets. By the time that other incumbents might make the corporate decision to retaliate, obtain certification, build out facilities, interconnect with SBC/Ameritech, and actually win customers, the discounted loop prices may be long gone – while in the interim, SBC/Ameritech's in-region unbundled loop rates would have skyrocketed upwards again to the detriment of would-be competitors already in the market.

B. The Merger Conditions Must Be Carefully Crafted to Promote the Deployment of Advanced Telecommunications Services Without Unleashing SBC/Ameritech From Necessary Service Restrictions.

1. The Commission Should Establish Standards for the Provision of Loop Pre-Qualification and Qualification Information.

The Merger Conditions would commit SBC/Ameritech to providing unaffiliated CLECs with nondiscriminatory access to "the same loop pre-qualification information that is available to SBC/Ameritech's retail operations"⁸ Although this commitment represents a positive first step in terms of ensuring parity of access, the Commission should also impose absolute standards for the provision of pre-qualification information in order to promote more effectively the deployment of advanced services through xDSL technology. For example, pre-qualification and qualification information is truly useful only to the extent that it precisely identifies: (i) the existence and location of obstructions, such as bridged taps, load coils, and repeaters; and (ii) the exact length of the loop. CLECs can then use this information to determine whether alternative means of provisioning xDSL service exist over the given facilities.

Moreover, this information would prove most useful if it is available to CLECs on an immediate basis through electronic interfaces. The SBC/Ameritech Merger Conditions are vague on this point, noting merely that this information will be available on a nondiscriminatory basis "whether such access is by electronic or non-electronic means."⁹ If the Commission will truly

⁸ *Merger Conditions*, App. A at 13-14.

⁹ *Id.*, App. A at 14.

promote the increased deployment of advanced services over existing wireline facilities, the Merger Conditions must be supplemented to mandate the availability of pre-qualification and qualification information through electronic interfaces. Finally, the Commission should then add standards for performance in terms of the accuracy and timeliness of delivery of pre-qualification and qualification information to the performance measurements section of the Merger Conditions (Attachment A-1), and include SBC/Ameritech's performance in this regard in the calculation of liquidated damages set forth in Attachment A-3. Incorporating performance standards and financial penalties for failures to comply with these standards into the Merger Conditions is the only means of ensuring that SBC/Ameritech has an adequate incentive to provide accurate and timely loop pre-qualification and qualification information.

2. In Light of the Language and Purpose of the Act and Ongoing Commission Proceedings, the Commission Should Reject the Creation of an Advanced Services Affiliate.

The Merger Conditions propose to create a separate SBC/Ameritech affiliate for the provision of advanced services. The Joint Commenters fail to see, however, how this represents a "condition" upon merger at all. Instead, this is quite clearly an unwarranted expansion of SBC/Ameritech's authority that would more likely promote the company's own interest than the development of competition within its region or the deployment of advanced services nationwide. For this reason and the reasons explained below, the Merger Conditions should not confer such a gift upon SBC/Ameritech.

As a preliminary matter, the language and purpose of Section 272 of the Act dictate that the Commission reject the creation of a separate affiliate through which SBC/Ameritech would provide advanced services. Section 272 was not intended as an independent means to provide the Bell Operating Companies ("BOCs") with expanded service authority *prior* to demonstrating compliance with the competitive checklist set forth in Section 271. Rather, it was created as part of a system to monitor ongoing discrimination by BOCs *following a demonstration that the BOC in question had already complied with the competitive checklist*. Indeed, the plain language of Section 271(d)(3) confirms that the separate company to be structured in accordance with Section 272 would operate only after the Commission first determined that the BOC had complied with the various requirements of Section 271(c).¹⁰ Thus, the carefully designed structure and purpose of the Act should weigh against allowing a BOC to use a separate affiliate to provide the desired advanced services free from incumbent regulation without the requisite statutory demonstrations – particularly when the Merger Conditions would give SBC/Ameritech the vague authority to provide operational, installation, and maintenance support in a manner that appears contrary to the nondiscrimination safeguards required under section 272.¹¹ In other words, the Commission should ensure that the protections associated with the competitive checklist are not eviscerated in a rush to give BOCs greater ability to deploy advanced services.

¹⁰ 47 U.S.C. § 271(d)(3) (1996).

¹¹ *Merger Conditions*, App. A at 15.

Moreover, the separate affiliate envisioned by Section 272 was intended to compete in a robust, mature market wherein the treatment of the BOC affiliate would allow the Commission to monitor discrimination by the BOC against the established unaffiliated competitors already present in the mature, robust interLATA services market.¹² By contrast, the separate affiliate that would be created under these Merger Conditions would enter a market that is too new to be called truly developed or competitively robust, particularly if one believes that the Commission still needs to promote more widespread deployment of advanced services.¹³ In fact, there are still far too many unanswered questions in the context of the nascent advanced services market to allow SBC/Ameritech to provide such services free from regulation. For example, the Commission has not even begun to consider a significant question with which the industry is still grappling – whether incumbent local exchange carriers ("ILECs") are truly pricing their DSL services appropriately and lawfully. Until the Commission resolves such threshold issues as the appropriate cost-based pricing for these services, it should not unleash incumbents such as SBC/Ameritech from regulation in the provision of those services.

¹² See *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of The Communications Act of 1934, as Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21914 (1996), at ¶ 16. ("The structural separation requirements of section 272, in conjunction with the affirmative nondiscrimination obligations imposed by that section, also are intended to address concerns that the BOCs could potentially use local exchange and exchange access facilities to discriminate against competitors in order to gain an anticompetitive advantage for their affiliates that engage in competitive activities.")

¹³ *Advanced Services NPRM*, at ¶¶ 3, 8-13.

Finally, adopting a separate advanced services affiliate in the context of this proceeding would be procedurally suspect. There is currently an open rulemaking in CC Docket No. 98-147 that is considering whether the BOCs generally should be permitted to employ a separate affiliate to provide advanced services free from incumbent regulation.¹⁴ Giving SBC/Ameritech such authority as a result of this proceeding would effectively prejudge the open rulemaking, without paying proper procedural heed to the evidence previously submitted in this other docket. Indeed, determining in the context of these Merger Conditions that SBC/Ameritech should be allowed to employ a separate advanced services affiliate would pay particularly short shrift to the details – such as the definition of advanced services, the regulatory status of the affiliate, and how to transfer equipment, allocate costs, and recognize transactions between the BOC and the affiliate – that are at the heart of the open rulemaking and are critical to determining whether a separate affiliate relationship will adequately deter discrimination and identify such conduct when it does occur. Even if the Merger Conditions were to require compliance with every tentative conclusion set forth in the *Advanced Services NPRM*, this still may not suffice to ensure adequate protections against discriminatory behavior, since the regulation of rates for advanced services and the threat posed by the sheer size and resources of the BOC advanced services affiliate are not addressed thoroughly in the Merger Conditions. Thus, the Commission should not take such groundbreaking action in the context of a significant merger proceeding to grant SBC/Ameritech this special authority, when a whole host of competitive and financial concerns are already on the table here and it is all too easy to lose track

¹⁴ *Id.* at ¶ 13.

of even a single important issue like this one. Rather, the Commission should take careful account of the evidence filed in CC Docket No. 98-147 and make a more informed decision on the basis of the record in that docket.

C. The Creation and Implementation of Efficient Operations Support Systems ("OSS") Should be a Pre-Condition to Merger Approval.

Under the Merger Conditions, SBC/Ameritech would be subject to a detailed schedule of commitments for the phased roll-out of OSS enhancements and improvements. Careful scrutiny reveals, however, that this detailed schedule is short on substance and filled with "phases" and process. For example, even though there is an end date of twenty-four months for implementation of industry standard OSS interfaces, this deadline is dependent upon the duration of "Phase 2" being no more than one month.¹⁵ It is entirely unrealistic to assume that SBC/Ameritech will be able to come to resolution of OSS issues with all of the CLECs operating throughout the 13 combined states in the space of a single month through a single workshop. The BOCs, CLECs, state commissions, and this Commission have been debating for approximately *three years* now the development of appropriate industry standards for OSS interfaces.¹⁶ A Commission rulemaking to consider OSS

¹⁵ *Merger Conditions*, App. A at 4.

¹⁶ *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15759-62 (1996), at ¶¶ 513-515 (referring to comments filed regarding the need for standard OSS interfaces). In fact, the debate over the need for uniform OSS deployment by the BOCs dates back to at least 1991, when Enhanced Service Providers ("ESPs") raised this concern with the Commission. In an order released that year, the Commission found that "[u]niformity of OSS services is important to ESPs because OSS services enable them to manage their networks." *Filing and Review of Open Network Architecture Plans*, CC Docket No. 88-2, Memorandum Opinion and Order, 6 FCC Rcd 7646, 7669

concerns and develop performance benchmarks has stood stagnant for over a year,¹⁷ and the petition submitted by LCI and the Competitive Telecommunications Association to initiate this OSS rulemaking was submitted over two years ago.¹⁸ To expect SBC/Ameritech and CLECs to resolve all open OSS issues within a single month's time in light of this history asks the impossible. Rather than ensuring the timely delivery of OSS, adopting the OSS deployment schedule proposed in the Merger Conditions would ensure that SBC/Ameritech is able to enjoy the benefits of its merger for some (perhaps lengthy) amount of time without needing to deploy OSS to realize those benefits. The fact that disputes over OSS deployment are to be submitted to the Common Carrier Bureau for resolution or binding arbitration provides little comfort, since there is no time limit for this process and under the terms of the Merger Conditions the arbitrator's subject matter experts are to be chosen from a list supplied by SBC/Ameritech.¹⁹

Failing to require the implementation of OSS prior to final approval of the merger is therefore an invitation for delay by SBC/Ameritech. By contrast, requiring the deployment of OSS prior to merger consummation would provide a more appropriate means of prompting

(1991), at ¶ 49.

¹⁷ *Performance Standards, Measurements, and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, CC Docket No. 98-56, RM-9101, Notice of Proposed Rulemaking, 13 FCC Rcd 12817 (1998). Comments and Reply Comments were filed in this proceeding on June 1, 1998 and July 6, 1998, respectively.

¹⁸ *Petition for an Expedited Rulemaking by LCI International Telecom Corp. and Competitive Telecommunications Association*, CC Docket No. 96-98 (filed May 30, 1997).

¹⁹ *Merger Comments*, App. A at 5.

SBC/Ameritech to cooperate with CLECs. It is clearly in the interest of CLECs (and their customers) to obtain workable electronic interfaces as soon as possible, so there is little danger that they would delay the deployment process just to stall merger consummation. SBC/Ameritech, on the other hand, almost certainly needs a "carrot" to deploy effective OSS in a timely manner. By denying SBC/Ameritech the benefits of the merger until OSS is in place, the Commission could better ensure that both sides come to the table ready to bargain for OSS deployment with all due speed. The Commission should therefore require that SBC/Ameritech deploy OSS prior to merger closing. The Commission should also ensure that under whatever deployment schedule is ultimately adopted, deployment disputes *do not* go to commercial arbitration and that SBC/Ameritech's hand-picked experts *are not* placed in a position where their influence can resolve the disputes.

On a related note, SBC/Ameritech would waive all charges for use electronic interfaces for 3 years under the Merger Conditions, starting with the first billing cycle following merger closing.²⁰ Yet CLECs should not be made to pay for electronic interfaces until they are receiving the benefits of standard OSS interfaces that have been fully developed and implemented. Thus, this condition should be modified to state that these charges will be waived for a period of 3 years following proof by SBC/Ameritech that the standard electronic interfaces developed under the Merger Conditions are operational for CLECs throughout its region.

²⁰ *Id.* App. A at 12.

D. The Limited Collocation Conditions Do Not Depart from Existing Commission Rules.

Committing the combined SBC/Ameritech entity to adhere to requirements that are already applicable under federal law will not magically transform this transaction from one that raises serious competitive concerns into a merger that serves the public interest. For example, the commitments in the Merger Conditions with respect to collocation simply require SBC/Ameritech to comply with "governing Commission rules" and to tariff its standard collocation terms and conditions (or offer the standard terms for inclusion as amendments in interconnection agreements). The only additional "condition" imposed upon SBC/Ameritech that is not imposed upon every other ILEC is to retain an independent auditor to verify compliance with the Commission's collocation requirements.²¹ This is more a matter of enforcement than a truly substantive condition that SBC/Ameritech must accept.

Sustaining local competition in the face of the SBC/Ameritech behemoth requires that the Commission consider conditions and enforcement mechanisms above and beyond what is already required under governing law. The Commission should not only compel the SBC and Ameritech companies to file collocation tariffs (or offers amendments to CLECs), but it should also mandate that CLECs have the opportunity to comment upon the proposed collocation terms and seek appropriate changes to those terms *prior* to the merger taking effect. It makes little sense to allow the merger to take effect if CLECs could be forced to abide by collocation terms that do not even

²¹ *Id.*, App. A at 2.

comply with current Commission rules. The promise of an independent audit that concludes ten months *after* merger closing offers little solace to CLECs forced to operate for nearly a year (or perhaps more, pending corrective action) under collocation terms that may not provide the full extent of rights available under Commission rules.²² Allowing CLECs and other interested parties to comment upon and shape the collocation terms prior to merger approval will better serve the purpose of ensuring that SBC/Ameritech cannot discriminate against competitors in this regard.

It is also important that collocation performance constitute a greater part of the parity measurements if these collocation requirements are to have any meaning. While metric 19 of the Merger Conditions measures the percentage of missed due dates for collocation projects, there is no absolute deadline for the completion of such projects. As a result, SBC/Ameritech has an incentive to give CLECs as distant of a collocation due date as possible, so that it will avoid liability for failure to perform in accordance with this metric. Thus, the Joint Commenters support the adoption of specified intervals of performance with respect to collocation, and corresponding remedies where SBC/Ameritech fails to meet these intervals. For example, SBC committed earlier this year to notify CLECs filing applications within 10 business days where central office space would not be available for collocation.²³ Moreover, SBC committed to provide price quotations within 10 business days

²² There are also a number of concerns about the scope of this audit, including the purported independence of the auditor and whether the audit report and underlying data might be made available publicly. These are the kinds of items that should be resolved prior to adoption of any Merger Conditions, in order to avoid the need for subsequent litigation and delay.

²³ *Investigation of Southwestern Bell Telephone Company's Entry into Texas InterLATA Telecommunications Market*, Project No. 16251 (Tex. P.U.C. April 26, 1999) ("*Texas Collaborative*

where the CLEC files 1 to 5 collocation applications simultaneously.²⁴ There should also be an absolute deadline for the completion of make ready work for collocation space, with this interval being no longer than the 76 business days for physical collocation and the 105 business days for virtual collocation to which we understand Bell Atlantic has committed in New York,²⁵ and perhaps shorter in length. While SBC/Ameritech will undoubtedly argue that these intervals are not applicable to their operations (as even Bell Atlantic itself has done in jurisdictions outside of New York), the Commission should consider these intervals to constitute "best practices" and allow SBC/Ameritech to avoid compliance with them only if it can demonstrate that such intervals are infeasible from a technical or operational perspective. (It would then need to compel SBC/Ameritech to meet other intervals that would be appropriate for the combined company's operations.) The Commission should also find that failures to comply with these intervals will be included in the calculation of the liquidated damages sum set forth in Attachment A-3 of the proposed conditions.

Process MOU"), Attachment B at 16.

²⁴ *Id.* The interval increased to 25 business days to process and provide quotes in the case of 6-20 applications, and increased by 5 business days for every 5 applications thereafter.

²⁵ *See Re Competitive Local Exchange Carriers*, Cases No. 98-C-0690, 95-C-0657, Opinion No. 98-18, 1998 WL 1013474 (N.Y.P.S.C. Nov. 23, 1998), at *3. In Texas, SBC committed to a 90-day turnaround time for active central office space and a 140-day turnaround for inactive space in most central offices. *Texas Collaborative Process MOU*, Attachment B at 16.

E. The Merger Applicants Should be Required to Provide Directory Listings at Cost-Based Prices.

In its initial Comments in this docket filed last October, McLeodUSA urged the Commission to impose a condition that would require the combined SBC/Ameritech entity to provide directory listings at cost-based prices. This concern arises because carriers may choose to include the publishing of a directory as part of the package of services they deliver to consumers. Under Section 222(e) of the Act, all local exchange carriers are required "to provide subscriber list information . . . under nondiscriminatory and reasonable *rates*, terms, and conditions."²⁶ Yet McLeodUSA's experience with a number of ILECs reveals a wide and inexplicable disparity in the cost of providing directory listings to CLECs. For example, while SBC charges \$0.25 per listing, Ameritech charges only \$0.13 per listing. Both of these rates far exceed the \$0.04 per listing charged by BellSouth. If it is to approve the merger, the Commission should require as a Merger Condition that SBC/Ameritech develop cost-based directory listing prices for their combined region, and mandate that the Ameritech rate be used as a proxy ceiling in the interim.²⁷ If there is disagreement over what

²⁶ 47 U.S.C. § 222(e) (1996) (emphasis added).

²⁷ While the appropriate terms and conditions for the provision of subscriber list information are still under Commission review, adopting an interim proxy price is necessary to promote competition in this area and enforce the terms of the statute. *See Implementation of the Telecommunications Act of 1996*, CC Docket No. 96-115, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, 8072 (1998), at ¶ 10 (announcing the Commission's intent to "consider subsequently, in a separate order, the meaning and scope of section 222(e) of the 1996 Act, relating to the disclosure of subscriber list information by local exchange carriers," and asserting that the duty to disclose subscriber list information on nondiscriminatory rates, terms, and conditions "exists presently, independent of any implementing rules we might promulgate in the future, and a failure to discharge this duty may well, depending on the

constitutes a reasonable price following the rates developed through SBC/Ameritech's cost analyses, SBC/Ameritech should then submit to arbitration before the Commission to arrive at an appropriate, cost-based rate for directory listings that comports with the express directives of Section 222.

F. The "Most Favored Nations" Clauses Proposed by SBC/Ameritech Would Do Little to Advance Competition or Ensure Nondiscrimination.

The proposed "most favored nations" provisions of the Merger Conditions suffer from internal inconsistencies that must be resolved – and anti-competitive limitations that must be removed – before the merger can be approved. The most obvious and unjustifiable inconsistency is that only the terms of *arbitrated* out-of-region agreements and *negotiated* in-region agreements will be made available under the Merger Conditions.²⁸ Taken together, these designations make little sense, and the Merger Conditions provide no explanation for distinguishing between the kinds of agreements that will be available out-of-region and in-region. In fact, there is no basis for placing any limitations upon the kinds of agreements that will be made available by SBC/Ameritech. In the case of out-of-region agreements, SBC/Ameritech could thwart the availability of any terms or conditions simply by agreeing to them voluntarily rather than seeking better terms through arbitration. Indeed, this Merger Condition will simply give SBC/Ameritech the incentive to "opt into" other CLEC agreements outside of its own region, thereby obtaining terms and conditions at

circumstances, constitute both a violation of section 222(e) and an unreasonable practice in violation of section 201(b)"). If the Commission's ultimate decision with respect to subscriber list information somehow requires a different result than that proposed here, it could then ensure that SBC/Ameritech's provision of directory listings comports with that subsequent finding.

²⁸ *Merger Conditions*, App. A at 28.

little cost that would be off-limits to any of the competitors in its incumbent region. To minimize the opportunities for such strategic avoidance of the Merger Conditions by SBC/Ameritech, the Commission should revise this condition to provide CLECs with the ability to take advantage of the terms agreed to by SBC/Ameritech in *all* out-of-region agreements.

Similarly, there is no reason to limit the availability of in-region agreements to those that have been voluntarily negotiated by SBC/Ameritech following the time that SBC became the parent company of the particular ILEC. Such a restriction would necessarily exclude arbitrated Ameritech, Pacific Bell, and SNET agreements from use by competitors. Yet SBC/Ameritech is not making the claim that these agreements are somehow unworkable under the present company's operations – if specific terms from other agreements are not technically feasible or lawful for SBC/Ameritech to implement in a given state, the company has the opportunity under the Merger Conditions to avoid any obligation to provide service under those terms. Thus, there are no technical or legal barriers to making such agreements available. Rather, this restriction is merely a reflection of SBC/Ameritech's reluctance to allow the progress made in one state to take effect in other states as well. The Commission should direct that SBC/Ameritech make the terms of *all* in-region interconnection agreements available for use by competitors, notwithstanding the arbitrated or negotiated genesis of those terms.

Finally, as mentioned above, the Merger Conditions would excuse SBC/Ameritech from complying with any term from another interconnection agreement if it is not feasible "to provide given the technical, network and OSS attributes and limitations" of the company's operations in the

given state, or if it would be unlawful to provide the requested interconnection arrangement or unbundled network element.²⁹ The Joint Commenters recognize the need for such provisions, but believe that these exclusions from the "most favored nations" obligation must be better defined to eliminate any opportunity for misuse or delay. For example, the Commission should provide that where a dispute arises over whether a particular interconnection agreement term falls within these exclusions, the parties may petition the state commission for resolution of that dispute. The Commission should also make clear that since SBC/Ameritech would be seeking to avoid its obligations through a claim of technical infeasibility or unlawfulness, it would bear the burden of proof in sustaining that claim, regardless of which party petitions the state commission for relief.

G. The Performance Measurement and Payment Mechanism Proposed by SBC/Ameritech Needs Improvement if it Will Effectively Deter Substandard Performance and Compensate CLECs for Harm They Suffer.

1. The Merger Conditions Should Include More Than a "Texas-Lite" Performance Parity Plan.

While SBC and Ameritech trumpet the proposed performance monitoring and enforcement provisions as going "well beyond what the Commission has required of potential merger partners in the past,"³⁰ this does not provide reason by itself to stop at the performance parity plan currently set forth in the Merger Conditions. In fact, the 20 measurements proposed by SBC/Ameritech are

²⁹ *Id.*

³⁰ Ex Parte Letter of Richard Hetke, Senior Counsel, Ameritech Corporation, and Paul K. Mancini, General Attorney and Assistant General Counsel, SBC Communications, Inc., to Magalie Roman Salas, Secretary, Federal Communications Commission, dated July 1, 1999, at 5.

only a small percentage of those adopted as a result of the collaborative process in Texas.³¹ While it may be that even the Texas plan does not provide sufficient information and incentive for SBC to provide quality service to its competitors, it certainly should not retreat from that plan. Neither SBC nor Ameritech has given any principled reason for limiting the performance parity plan in the manner suggested by the Merger Conditions. The Joint Commenters therefore urge the Commission to consider expanding the plan to include other much-needed metrics, such as the collocation measures discussed above and those that may be recommended by other Commenters.

2. Implementation of the Performance Payments Should Occur More Quickly and Last Longer.

Under the proposed "Federal Performance Parity Plan," SBC/Ameritech would be required to begin making payments for substandard performance 9 to 15 months after the merger closes and it would be excused from making any more payments 45 months after the date of merger closing.³² It is not clear why SBC/Ameritech believes that payments should be excused initially for so many months, or why the payments should expire after only 30 to 36 months after they become effective. If SBC/Ameritech is concerned about implementing and calibrating its performance measurement process, presumably it could begin now to develop and internally audit its measurement systems to ensure the accuracy of its performance data, rather than taking 9 to 15 months after merger closing to do so. Moreover, there is no reason to halt payments for substandard performance less than 5

³¹ See *Texas Collaborative Process MOU*, Schedule 2 (setting forth 121 categories of performance measurements).

³² *Merger Conditions*, App. A at 1.

years after merger closing. As discussed below, the Joint Commenters believe that 5 years is the minimum amount of time the Commission should employ as a "sunset," if it will employ a sunset provision at all. Accordingly, the Commission should direct that the payments to be made by SBC/Ameritech under the performance parity plan start upon merger consummation, and continue until all of the Merger Conditions have expired.

II. THE SUNSET PROVISIONS GOVERNING THE PROPOSED CONDITIONS ARE ARTIFICIAL AND WOULD HARM THE DEVELOPMENT OF A COMPETITIVE MARKET.

The Merger Conditions propose to self-terminate 3 years after consummation of the merger, with the caveat that the Commission could formally order the extension of requirements under certain narrowly defined circumstances.³³ The Joint Commenters believe that this "sunsetting" of SBC/Ameritech's regulatory obligations is misguided, allowing the obligations to lapse even though a real need for those obligations may remain. It would be artificial and arbitrary to pick now a date in the future upon which the competitive consequences of this merger are no longer significant, or to guess the date upon which competitors will be so well established in the market that unleashing SBC/Ameritech from these conditions would do no harm. Rather than structuring a "sunset" to eliminate all of the Merger Conditions, it would be more sensible, in light of the serious competitive consequences of this merger that prompt the need for conditions in the first instance, to require continued compliance with the Merger Conditions pending some kind of periodic review by the Commission. For example, the Commission could specify that the Merger Conditions will last a

³³ *Id.*, App. A at 36.

minimum of 5 years, with the need for the continued effectiveness of individual conditions being the subject of a regular biennial review process starting in that fifth year.

In the alternative, if the Commission will not reject the use of an absolute sunset, it should extend the sunset beyond the 3 years currently proposed under the Merger Conditions. It has already been more than three years since the Telecommunications Act of 1996 became law, and local competition remains in largely a nascent stage of development.³⁴ The Joint Commenters submit that a 5-year sunset would more appropriately reflect the economic and regulatory difficulties that still slow entry and establishment of operations in the local exchange market, and give new entrants more time to plant firm roots in the market.

³⁴ See Chairman William E. Kennard, "A Competitive Call to Arms," Speech before the Association of Local Telecommunications Services Convention (May 3, 1999) (stating that "the Telecom Act of 1996 is a framework that recognizes that the transition to competition is needed, and it does not happen overnight. It requires hard work."); Chairman Kennard, Statement before the Senate Commerce Committee (May 26, 1999) ("Vigorous enforcement of the fundamental prerequisites for competitive markets and active, intelligent dispute resolution will remain necessary for some years to come, particularly if we are to avoid the kind of lengthy antitrust litigation that plagued the development of long distance competition. Indeed, today, we are at that very delicate 'tipping point': with just a little more time – and a lot more effort – we'll be over the top and competition will gain a firm foothold.")

III. THE MERGER CONDITIONS SHOULD BE PART OF THE PUBLIC INTEREST ANALYSIS IN ANY SUBSEQUENT SECTION 271 PROCEEDINGS INVOLVING A SBC/AMERITECH ENTITY.

The Commission should also include an additional provision as part of the Merger Conditions that would expressly tie SBC/Ameritech's compliance with the Merger Conditions to a finding that any section 271 application from the company would serve the public interest. If these conditions are intended to ensure that this merger serves the public interest by mitigating "potential public interest harms and questions about the claimed competitive and consumer benefits of the proposed combination,"³⁵ SBC/Ameritech's failure to comply with the Merger Conditions should certainly be incorporated into any analysis of whether the company merits a grant of in-region interLATA authority under section 271 of the Act.³⁶ While this would certainly not be the only factor the Commission might take into consideration in assessing whether a SBC/Ameritech application for interLATA authority was consistent with the public interest, including this factor as an express part of such an analysis would reduce the possibility of subsequent disputes over the Commission's grounds for making a particular public interest finding.

³⁵ *Pleading Cycle Established for Comments on Conditions Proposed by SBC Communications, Inc. and Ameritech Corporation for their Pending Application to Transfer Control*, CC Docket No. 98-141, Public Notice (rel. July 1, 1999).

³⁶ *See* 47 U.S.C. § 271(d)(3)(C) (1996) (requiring that the Commission find that a grant of in-region interLATA authority is "consistent with the public interest, convenience, and necessity").

IV. CONCLUSION

For the foregoing reasons, the Joint Commenters respectfully request that the Commission modify the proposed Merger Conditions as recommended herein. Absent such modifications, the proposed merger should not be found to serve the public interest and should be rejected in its entirety.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Michael R. Romano", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Michael R. Romano, hereby certify that on this 19th day of July 1999, copies of the foregoing Joint Comments of Focal Communications Corporation, Hyperion Telecommunications, Inc., d/b/a Adelphia Business Solutions, and McLeodUSA Telecommunications Services, Inc. in CC Docket No. 98-141 were sent via first class U.S. mail to the parties on the attached list, unless marked otherwise.

A handwritten signature in cursive script, reading "Michael R. Romano", written in black ink.

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VIA COURIER (In Bold)

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